STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK JACOBS,

Defendant-Appellant.

UNPUBLISHED
April 9, 1999

No. 202655
Washtenaw Circuit Court
LC No. 95-004249 FH

Before: Markman, P.J., and Hoekstra and Zahra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of four counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) (sexual contact with a person under thirteen years of age). He was sentenced to four concurrent terms of five to fifteen years' imprisonment. He appeals as of right. We affirm.

Two of defendant's convictions were based on acts involving his intentional touching of the complainants' breasts. Defendant claims that, because the victims were six and eight years old when the alleged incidents took place, they were too young to have "breasts" for purposes of the criminal sexual conduct statute. Therefore, defendant reasons, because an element of the crime could not be established, the evidence was insufficient to support his conviction. We disagree.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *City of Port Huron v Amoco Oil Company, Inc*, 229 Mich App 616, 624 (1998). The first criterion in determining legislative intent is the specific language of the statute. *Id.* If the plain and ordinary meaning of the statutory language is clear, judicial construction is neither necessary nor permitted. *Id.* The plain language of the statute must be given effect.

We find the statute at issue to be clear and unambiguous. The statute refers to the "breast of a human being" rather than the "breast of a fully developed female." The phrase "breast of a human being" includes the chest area of a prepubescent girl. Any other interpretation of this statute would yield an absurd result, since children under age thirteen are expressly included in the scope of the statute. Indeed, it is for their protection that the statute was enacted. Accordingly, we find defendant's

contention that he could not be convicted of touching the "breasts" of a prepubescent girl to be without merit.

Defendant also argues that the evidence was insufficient to convict him of second-degree criminal sexual conduct. We disagree. In addition to showing that the complainants were under the age of thirteen, the prosecution was required to show that the defendant engaged in intentional touching of a complainant's intimate parts or the clothing immediately covering that area and that the intentional touching could reasonably be construed as being for a sexual purpose. *People v Piper*, 223 Mich App 642, 646-647; 567 NW2d 483 (1997); MCL 750.520a(k); MSA 28.788(1)(k); MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The statute defines "intimate parts" as including the primary genital area, groin, inner thigh, buttock, or breast of a human being. MCL 750.520a(c); MSA 28.788(1)(c).

Viewed most favorably to the prosecution, the evidence was sufficient to enable a rational trier of fact to find that each of the elements of second-degree CSC was proven beyond a reasonable doubt as to each of the four counts. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v McMillan*, 213 Mich App 134, 139; 539 NW2d 553 (1995). Kelly, a seven year old complainant, testified that during a game called "rocking chair," she would sit on defendant's lap, facing him, with her legs wrapped around his waist. Defendant would then move Kelly forward and backward over his pelvic region. On other occasions, defendant eased his hands underneath the front of Kelly's shirt and moved them over her breasts. Six year old Amanda testified that when defendant was scratching her back, "he would try to feel my titties" and that he put his hands on her "titties" and moved them around in circles. Amanda also described a game, which she called "humping," where she would sit across defendant's lap, facing him, while he moved her up and down. From the foregoing testimony, the jury could have reasonably concluded that defendant intentionally touched the complainants' breast and genital area. The credibility of the witnesses was for the trier of fact to resolve and this Court will not resolve it anew. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1991).

We also find that there was sufficient evidence from which the jury might infer that the intentional touching could reasonably be construed as being for sexual arousal or sexual gratification. Defendant admitted that on two occasions while "horseplaying" with the complainants, he experienced an erection. He also told investigating officers that he inserted his tongue in the mouths of Kelly and Amanda while kissing them. There was also evidence that defendant engaged in inappropriate activities with the complainants that were of a sexual nature or sexually explicit. Defendant admitted to telling adult jokes to children in his home, playing a game the complainants referred to as "sluts and whores" and showing a sexually explicit video tape version of *Cinderella*. Based upon the foregoing, we conclude that there was sufficient evidence to support the inference that the intentional touching was for a sexual purpose or could reasonably be construed as being for the purpose of sexual arousal or sexual gratification.

We also reject defendant's claim that his right to a unanimous verdict was violated because the trial court failed specifically to instruct the jury that it had to unanimously agree on a single act for each count. The case did not involve alternative acts that were materially distinct, nor was there any reason to believe that the jury might be confused or would disagree about the factual basis of defendant's guilt. *People v Cooks*, 446 Mich 503, 512-513, 524; 521 NW2d 275 (1994). To the contrary, the risk of

juror confusion was avoided because the trial court did not give a specific unanimity instruction. As noted in *Cooks, supra,* at 525, n 28:

> In a situation in which a very young child testifies about a series of similar molestations without identifying any specific dates, the unanimity instruction should not be given as it would be confusing for the jury to be given an instruction requiring them to agree on a specific act, when there is no specific act for them to agree upon. . . . . Here, the jury's verdict indicates that the jurors believed [the victim], not [the defendant].

For these reasons we find that the trial court's general instruction on unanimity was sufficient.

Next, defendant claims the second-degree criminal sexual conduct statute is unconstitutionally vague. We disagree. Contrary to defendant's assertion, by defining "sexual contact" as intentional touching that "can reasonably be construed as being for the purpose of sexual arousal or gratification," MCL 750.520a(k); MSA 28.788(1)(k), the statute does not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed. *Piper, supra* at 647. Rather, the statute's language provides a structure to guide the jury's determination of the purpose of the contact. *Id.*

We also find without merit defendant's claim that § 520a(k) impermissibly shifts the burden of proof to defendant. Criminal sexual conduct is a general intent crime. *Piper, supra* at 646. The prosecutor need only prove an intentional contact that could reasonably be construed as being for a sexual purpose. *Id.* at 647. Accordingly, § 520a(k) does not shift the burden of proof to defendant. *Id.*

Defendant's last claim on appeal is that the trial court abused its discretion in admitting evidence regarding certain statements and events involving a sexual content, but not sexual contact, thereby denying him a fair trial. Defendant claims that this evidence was inadmissible under MRE 404(b). We disagree. The admissibility of other bad acts evidence is within the trial court's discretion. *People v Catanzarite,* 211 Mich App 573, 579; 536 NW2d 570 (1995). Here, much of the evidence in question was corroborative of the victims' testimony. Additionally, because defendant claimed innocent intent, the evidence describing other acts and statements of a sexual nature were admissible to show intent, a permissible purpose under MRE 404(b)(1). *People v VanderVliet*, 444 Mich 52, 78-80; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). Thus, the trial court did not abuse its discretion in admitting this evidence. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997).

Affirmed.

/s/ Stephen J. Markman
/s/ Joel P. Hoekstra
/s/ Brian K. Zahra